

1 THE HONORABLE RICHARD A. JONES  
2 THE HONORABLE MICHELLE L. PETERSON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITY OF SEATTLE, a municipal  
corporation, located in the County of King,  
State of Washington

Plaintiffs,

v.

MONSANTO COMPANY, SOUTIA INC.,  
and PHARMACIA CORPORATION,

Defendants.

CASE NO. 2:16-cv-00107-RAJ-MLP

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION TO  
EXCLUDE PROPOSED EXPERT  
TESTIMONY BY RICHARD C.  
PLEUS (Dkt. #284)**

**Noted for: August 26, 2022**

**Oral Argument Requested**

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1           Defendants Monsanto Company, Solutia Inc., and Pharmacia LLC (collectively,  
 2 “Defendants”) hereby oppose the City of Seattle’s (“City”) Motion to Exclude Proposed  
 3 Expert Testimony (“Motion”) by Richard C. Pleus (“Pleus”) (Dkt. # 284).

4 **I. INTRODUCTION**

5           The City’s Motion repackages its own theory of the case, as conveyed by its rebuttal  
 6 expert Charles D. Cowan (“Cowan”), into a *Daubert* motion that improperly seeks to  
 7 exclude Pleus’ opinions in their entirety. Indeed, the City’s Motion even repackages  
 8 arguments made in a separate motion the City filed to exclude the opinions of David L.  
 9 Sunding. In doing so, the City levies unsupported attacks on the reliability of Pleus’ data  
 10 and methodologies simply because it disagrees with his conclusions. A *Daubert* motion,  
 11 however, is not a proper avenue for the City to attack the strength of Pleus’ conclusions,  
 12 nor for the Court to determine which of the experts involved are right or wrong. *See City*  
 13 *of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1053 (9th Cir. 2014) (“Facts casting  
 14 doubt on the credibility of an expert witness and contested facts regarding the strength of  
 15 a particular scientific method are questions reserved for the fact finder.”). Judge Jones’  
 16 prior rulings consistently hold that *Daubert* motions are proper if an expert lacks the  
 17 qualifications and experience to support the offer opinions, but they are not an appropriate  
 18 substitute for expert cross-examination. *See, e.g., Fontana v. City of Fed. Way*, No. C11-  
 19 998 RAJ, 2014 U.S. Dist. LEXIS 6799 (W.D. Wash. Jan. 17, 2014) (expert in one field  
 20 cannot express an opinion relying on data that requires expertise in another field).

21           First, the City claims that Pleus relies on Sunding’s unreliable fish consumption  
 22 estimates. Motion, at 4–5. Defendants comprehensively rebut the City arguments in great  
 23 detail in their concurrently filed opposition to the City’s Motion to Exclude the Testimony  
 24 of David L. Sunding. *See* Dkt. # 347. In short, the fish consumption estimates on which  
 25 Pleus relies are the result of reliable, scientifically supported methodologies, and the City’s  
 26 argument displays its fundamental lack of understanding of Sunding’s work.

27           Second, the City claims that Pleus employs unreliable statistical methods in  
 28 calculating non-tribal human health risk. Motion, at 5–9. The City is wrong. Pleus’ work

1 uses common and conventional lognormal modeling that is consistent with EPA  
 2 methodology guidance for fish consumption. Importantly, the City's arguments are based  
 3 on its rebuttal expert's claim that Pleus has "substantially understat[ed] risk." *Id.* at 9.  
 4 Cowan is a statistician – not a toxicologist. As such, he is unqualified to opine on matters  
 5 concerning human health risks. *See* Defendants' Motion to Exclude Certain Opinions and  
 6 Related Testimony of Charles D. Cowan and Declaration in Support Thereof, Dkts. 312–  
 7 313. Cowan is not a toxicologist and admits he does not understand EPA risk assessment  
 8 methodology and is not qualified to distinguish between values as toxicologically relevant  
 9 or significant. Omnibus Declaration of Lisa DeBord ("DeBord Decl."), Ex. C, at 19:9–12,  
 10 67:22–24 (Cowan testifying he has never conducted a probabilistic risk assessment using  
 11 relevant EPA guidance); *id.* at 76:21–80:5 (Cowan testifying that he has no knowledge  
 12 regarding EPA's Reference Doses for Aroclors, which are used by toxicologists to assess  
 13 the potential for non-carcinogenic effects due to PCB exposure); *id.* at 112:17–113:5  
 14 (Cowan testifying he is not familiar with the EPA's cancer slope factors, which are used  
 15 by toxicologists to assess the potential for carcinogenic effects due to PCB exposure).  
 16 Challenges to Pleus' risk assessment methodologies based on Cowan's opinions should be  
 17 denied on that basis alone.

18        *Third*, the City takes issue with Pleus' use of data from the 2000 fish consumption  
 19 survey of the Suquamish Tribe rather than data from a 1996 study of the Tulalip Tribe.  
 20 Motion, at 9–12. In doing so, the City conveniently ignores that which its own rebuttal  
 21 expert acknowledged: the Tulalip Tribe does not have usual and accustomed fishing rights  
 22 in the Lower Duwamish Waterway ("LDW"), while EPA has indicated that the Suquamish  
 23 Tribe does. *See* DeBord Decl., Ex. J (T. Deshler Dep.) at 116:13–19, 118:7–23, 128:24–  
 24 129:23. The City also ignores that the older Tulalip study has no data specific to the LDW,  
 25 while the more recent Suquamish study does. The City's litigation-driven *belief* that there  
 26 *might* be better data does not render the work Pleus did unreliable such that exclusion is  
 27 appropriate under *Daubert*.

28        Pleus is a qualified expert offering relevant opinions supported by reliable, accepted

1 methodologies. Accordingly, the City's Motion to exclude his opinions should be denied.

2 **II. BACKGROUND**

3 **A. Pleus' Qualifications and Reports**

4 Pleus is a toxicologist with over 25 years of experience in assessing humans  
 5 exposed to chemical and biological agents, including agents in the environment. As  
 6 outlined in his November 21, 2021 Expert Report, Pleus conducted a probabilistic human  
 7 health risk assessment ("HHRA") of the LDW. Pleus' HHRA develops estimates of  
 8 potential PCB exposure to populations that engage in fishing or other recreational activities  
 9 in the LDW. Pleus then compared those estimates to U.S. EPA regulatory values protective  
 10 of human health. Specifically, Pleus assessed the potential for cancer risk using the EPA's  
 11 cancer slope factor for PCBs and the potential for non-carcinogenic effects using the EPA's  
 12 Reference Dose for Aroclor 1254. *See* Declaration of Gary A. Gotto in Support of  
 13 Plaintiff's Motion to Exclude Proposed Expert Testimony by Richard C. Pleus ("Gotto  
 14 Decl."), Dkt. 285, Ex. A (Dkt. 285-1), at vi-vii.

15 On June 7, 2022, Pleus served a Supplement to his Expert Report. Gotto Decl., Ex.  
 16 B. The Supplement "provide[s] updated noncancer hazard indices (HIs) and lifetime  
 17 excess cancer risks (LECRs)" necessitated by the coding corrections made by Sunding  
 18 made to his expert report. *Id* at 1. Pleus' Supplement relates to adjustments made to  
 19 account for Sunding's coding correction with respect to the LDW non-tribal fish  
 20 consumption rates. DeBord Decl., ¶ 23; *see also* Gotto Decl., Ex. B, at 1.

21 **B. Cowan Cannot Provide a Basis on Which to Exclude Pleus' Opinions**

22 Cowan is admittedly not a toxicologist. DeBord Decl., Ex. C, at 65:21–66:5;  
 23 66:13–18. He has never published in the field of toxicology. *Id.* at 25:9–14. He has never  
 24 published anything concerning an alleged association between PCB exposure and human  
 25 health effects. *Id.* at 28:15–22. He has never testified or issued any reports regarding  
 26 PCBs, the EPA's cancer slope factors for PCBs, EPA's Reference Doses for Aroclors, or  
 27 margin of exposure analysis. *Id.* at 29:18-20, 30:8-10, 30:20-22, 31:14-32:22. Cowan  
 28 testified he does not know what Aroclors are, what Reference Doses are, how Reference

1 Doses are calculated, who calculates Reference Doses, what uncertainty factors are for  
 2 Aroclor Reference Doses, or anything else about Aroclor Reference Doses. *Id.* at 76:21-  
 3 80:5. Cowan is not familiar with the EPA's cancer slope factors and does not know how  
 4 they are derived. *Id.* at 112:17-113:5. Moreover, Cowan has never conducted a  
 5 probabilistic risk assessment using relevant EPA guidance, nor is he familiar with EPA's  
 6 definition of deterministic risk assessments. *Id.* at 19:9-12; 67:22-24.

7 For these reasons, Defendants have filed a *Daubert* motion to exclude Cowan's  
 8 human health and risk-based opinions and conclusions. *See* Dkts. 312-313. Accordingly,  
 9 Defendants do not believe that Cowan's report or testimony provide proper bases on which  
 10 to exclude Pleus' toxicological opinions.

### 11 **III. LEGAL STANDARD**

12 Expert testimony that "meets the thresholds of relevance and reliability" goes to the  
 13 trier of fact. *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022). In  
 14 evaluating expert testimony, the Court is "'a gatekeeper, not a fact finder.'" *City of*  
 15 *Pomona*, 750 F.3d at 1043 (quoting *Primiano*, 598 F.3d at 565) (emphasized language  
 16 excluded from the City's legal standard). Indeed, "the test under *Daubert* is not the  
 17 correctness of the expert's conclusions but the soundness of his methodology." *Primiano*,  
 18 598 F.3d at 564-65 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311,  
 19 1318 (9th Cir. 1995)).

20 Evidence that is arguably "[s]haky but admissible" is challenged "by cross  
 21 examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.*  
 22 at 564. Accordingly, the Court's role is not to "exclude opinions merely because they are  
 23 impeachable." *City of Pomona*, 750 F.3d at 1044 (quoting *Alaska Rent-A-Car, Inc. v. Avis*  
 24 *Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)). For that reason, "[a] district court  
 25 should not make credibility determinations that are reserved for the jury." *Id.* at 1044.  
 26 "Simply put, '[t]he district court is not tasked with deciding whether the expert is right or  
 27 wrong, just whether his testimony has substance such that it would be helpful to a jury.'"  
 28 *Id.* (quoting *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969-70).

1 **IV. ARGUMENT**2 **A. The Fish Consumption Estimates on Which Pleus Relies Are Reliable**

3 The City first argues that Pleus relies on Sunding’s fish consumption estimates for  
 4 his non-tribal human health risk assessment, estimates which the City believes are  
 5 unreliable. Motion, at 4–5. The City’s argument is a summary of those made in its separate  
 6 *Daubert* motion to exclude Sunding, relying heavily on cross-references thereto. *Id.* If the  
 7 Court denies the City’s motion to exclude Sunding, the City’s first argument here is moot.

8 In order to avoid burdening the Court with duplicative arguments and supporting  
 9 documentation, Defendants similarly provide only a summary of their response to the  
 10 City’s Motion to Exclude Sunding. For a complete, detailed discussion of their position,  
 11 Defendants refer the Court to the simultaneously-filed Opposition to Motion to Exclude  
 12 David L. Sunding. *See* Dkt. #347. In short, each of the City’s claims regarding the  
 13 purported unreliability of Sunding’s fish consumption estimates is incorrect.

14 *First*, the Mayfield data on which Sunding relies does not concern only a ten-week  
 15 period. Rather, the Mayfield study was *conducted* over a ten-week period, but it elicited  
 16 information from responding anglers concerning their year-round fishing and consumption  
 17 behavior. DeBord Decl., Ex. A (Mayfield, et al., 2007)), at 606.

18 *Second*, Sunding’s fish consumption formula was corrected and is not otherwise  
 19 “flawed.” *See* Gotto Decl., Ex. F (Supplemental Report of Sunding, June 1, 2022). In fact,  
 20 the City fails entirely to acknowledge that Sunding submitted a Supplemental Report  
 21 correcting the “flaw” in his fish consumption calculations after his deposition. Motion, at  
 22 4–5. Notable too is the fact that the City quibbles with Sunding’s findings rather than the  
 23 reliability of his methodology, claiming Sunding “understated” consumption. Questions  
 24 regarding the credibility of Sunding’s findings go the trier of fact and are the proper subject  
 25 of cross-examination.

26 *Third*, avidity bias adjustments are common when estimating angler populations,  
 27 and Sunding’s in this case are reliable. EPA literature confirms that adjustments for fisher  
 28 frequency is a well-accepted practice, and the City offers no evidence to the contrary.

1 DeBord Decl., Ex. G (EPA Exposure Factors Handbook, Sep. 2011) at 10-3, 10-25. The  
 2 City has never understood avidity bias: Cowan had to wholesale withdraw his criticisms of  
 3 Sunding's avidity bias adjustments because he admitted that he fundamentally  
 4 misunderstood them. DeBord Decl., Ex. B (May 17, 2022 Gotto letter withdrawing  
 5 Cowan's avidity bias opinions); DeBord Decl., Ex. C, at 231:4-232:16, 233:4-234:11  
 6 (Cowan testifying "it wasn't clear to [him]" that Sunding only applied the avidity bias  
 7 adjustment to the fish consumption rate).

8       The only new argument the City presents in this Motion is that Pleus' June 2022  
 9 Supplement to his Expert Report presents updated risk values that are based on Sunding's  
 10 corrected estimates. Motion, at 5. As explained above, and in opposition to the City's  
 11 motion to exclude Sunding, Sunding's data and methodologies are reliable and  
 12 scientifically supported, and thus so is Pleus' use of Sunding's estimates in his reports.

13       **B. Pleus Employed Reliable Statistical Methods**

14       The City claims that Pleus' statistical methodology for calculating human health  
 15 risks for non-tribal anglers in the LDW was unreliable for two reasons: Pleus' use of (i) a  
 16 lognormal distribution for non-tribal fish consumption rates and (ii) fitting this lognormal  
 17 distribution to the median value of non-tribal fish consumption rate. Motion, at 5–6. Once  
 18 again, the City is mistaken. The City's lack of support, aside from referring to Cowan's  
 19 expert reports, is telling. Defendants note that the City cites Cowan five separate times in  
 20 this section. Yet, Cowan is admittedly not a toxicologist, not an expert in risk assessment,  
 21 and Defendants have moved to exclude in part because he is unqualified to opine on matters  
 22 of toxicological significance and alleged human health risk due to PCB exposure.

23       *i. Lognormal distribution*

24       The use of a lognormal distribution is a common and conventional modeling  
 25 approach for fish consumption rates according to EPA risk assessment guidance. *See*  
 26 DeBord Decl., Ex. K (EPA Risk Assessment Guidance for Superfund: Vol. III – Part A,  
 27 Process for Conducting Probabilistic Risk Assessment) at Appx. B (Selection and Fitting  
 28 of Distributions). Specifically, expert judgment—which Cowan admits he does not

1 possess in the field of toxicology—plays a role in selecting a distribution for the underlying  
 2 data.<sup>1</sup> *Id.* at B-15 (“When there is uncertainty associated with an input variable … expert  
 3 judgment may be appropriate for obtaining distributions … Elicitation of expert judgment  
 4 has been used to obtain distributions for risk assessments.”).

5 Moreover, media contact rates—like fish consumption—are often reasonably  
 6 modeled via lognormal distributions and are, in fact, identified by EPA as a specific  
 7 example of such. Appendix B of EPA’s Guidance identifies lognormal distribution as one  
 8 example of a probability distribution for a probabilistic risk assessment, describing the  
 9 basis as follows: “Multiplication of a large number of random variables, or equivalently  
 10 adding the logarithms of those numbers, will tend to yield a distribution with a lognormal  
 11 shape.” *Id.* at B-18, Table B-2. The examples EPA’s Guidance offers for a lognormal  
 12 distribution include “[c]hemical concentrations in environmental media; media contact  
 13 rates; rates and flows in both fate and transport.” *Id.* EPA’s Guidance continues: “Because  
 14 the basic risk equation is multiplicative, distributions of risk are generally lognormal. In  
 15 practice, lognormal distributions often provide good fits to data on chemical concentrations  
 16 in a variety of media (Gilbert, 1987; Ott, 1990).” *Id.* EPA’s Guidance provides an example  
 17 of fish ingestion rates modeled by a lognormal distribution. *Id.* at B-27, Exhibit B-8.

18 The City criticizes Pleus, speculating that it “appears” he did not conduct a  
 19 goodness of fit analysis when selecting a lognormal distribution. Motion, at 7. In doing  
 20 so, the City claims that the absence of a goodness of fit analysis “alone renders [the]  
 21 conclusion unreliable.” *Id.* This, again, is a misunderstanding of EPA Guidance. EPA  
 22 makes clear that goodness of fit tests “are one tool among several to assess the quality of a  
 23 distribution.” DeBord, Decl., Ex. K, at B-31. EPA also notes that, while important, such

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25 <sup>1</sup> Cowan likewise sought to fit Sunding’s fish consumption rates to a lognormal distribution. DeBord Decl.,  
 26 Ex. C, at 118:12-20; Gotto Decl., Ex. D, at 44 (Chart 2 and associated table). However, Cowan erred in  
 27 fitting Sunding’s fish consumption rates to a lognormal distribution and issued errata to Chart 2 of his  
 28 February 2022 report. DeBord Decl., Ex. C, at 106:14-24 (testifying the values in Chart 2 of his February  
 2022 report “are clearly incorrect”); DeBord Decl., Ex. F. The City is thus quarreling over a methodology  
 employed by Sunding that its own rebuttal expert on statistics unsuccessfully implemented.

1 tests are “less important than mechanistic considerations or graphical data exploration for  
 2 choosing a candidate distribution.” *Id.* Goodness of fit tests also “do not prove that the  
 3 population is described by the specific distribution,” as the City appears to believe. *Id.* at  
 4 B-32. Rather, per EPA, a goodness of fit tests demonstrates “that this assumption could  
 5 not be rejected.” *Id.*

6 More importantly, however, the fish consumption rate dataset was assessed by  
 7 Sunding for lognormality. Sunding applied two common tests of normality: the  
 8 Kolmogorov-Smirnov and Shapiro-Wilk tests. Declaration of D. Sunding, ¶ 3. Based on  
 9 these tests, Sunding could not reject lognormality of the total seafood consumption data,  
 10 resident seafood consumption data, or the resident fish consumption data among adult  
 11 anglers who consumed the associated species. Sunding Decl., ¶ 4. During their two days  
 12 of depositions of Sunding, the City had the opportunity but failed to ask him whether he  
 13 conducted a goodness of fit analysis for the fish consumption data. DeBord Decl., ¶ 22.

14 In addition, Pleus assessed the fish consumption dataset for lognormality using  
 15 the tests identified by EPA in its Risk Assessment Guidance. Declaration of R. Pleus, at  
 16 ¶¶ 3,4; *see also* DeBord Decl., Ex. L (R. Pleus Dep. (July 20, 2022)), at 194:12-196:22  
 17 (testifying he used EPA guidance in evaluating the goodness of fit of the lognormal  
 18 distributions used in his HHRA, but could not recall the specific test used). Specifically,  
 19 Pleus’ use of the Crystal Ball software for his Monte Carlo analyses involved a review of  
 20 the underlying total fish consumption and resident species consumption data using the  
 21 Kolmogorov-Smirnov and Anderson Darling tests. Pleus Decl., at ¶ 3; DeBord Decl., Ex.  
 22 K, at B-33–B-34; *see also* Gotto Decl., Ex. A at 7–8 (“To conduct the HHRA,  
 23 methodologies were applied from current U.S. EPA and other risk assessment guidance  
 24 and policies as appropriate”).

25 In other words, Pleus, in his expert toxicological judgment, chose an EPA-  
 26 sanctioned distribution model for his risk assessment in an area specifically identified as  
 27 an appropriate example by that same EPA Guidance. Conversely, Cowan, who is not a  
 28 toxicologist and has no familiarity with probabilistic risk assessments using EPA

1 Guidance, contends Pleus' method is "inappropriate" and unreliable. Motion, at 7.  
 2 Cowan's opinion provides no basis on which this Court should exclude Pleus.

3 *ii. Median versus mean values*

4 In addition to criticizing Pleus for fitting the non-tribal fish consumption rate data  
 5 to a lognormal distribution, the City argues that that Pleus should have fit the lognormal  
 6 distribution to mean or decile values rather than the median. Motion, at 6-7. According to  
 7 the City, Pleus' fitting of the lognormal distribution to the median "understate[d] the risk  
 8 to consumers." Motion, at 6-7. In doing so, the City once again relies on Cowan's  
 9 unqualified opinions regarding human risk significance, supported by a chart that Cowan  
 10 prepared that overstates the difference between median and mean values by manipulating  
 11 the data it displays.

12 Pleus' Supplement makes clear that the difference between median and mean-based  
 13 lognormal distributions for this fish consumption data do not amount to a toxicologically  
 14 significant hazard index. *See* Gotto Decl., Ex. B, at Table 1 (showing noncancer hazard  
 15 indices of 1.3 for the median and 2.0 for the mean at the 95<sup>th</sup> percentile). This is not a  
 16 toxicologically significant difference when considered among the various conservative  
 17 estimates incorporated into EPA Reference Dose for Aroclor 1254, including an safety  
 18 factor of at least 300. *Id.* at 1. Based on these calculations using Sunding's corrected non-  
 19 tribal fish consumption values, Pleus concluded that the LDW "population's exposure to  
 20 PCBs via fish ingestion from, and recreational activities in, the LDW does not confer a  
 21 significant noncancer or cancer health risk." *Id.*

22 Cowan's graph purporting to identify the differences between Pleus' lognormal  
 23 distribution and the underlying Sunding data overstates the significance of these  
 24 differences, as well as the significance of the difference between the median and mean  
 25 values. *See* Motion, at 8. Specifically, his graph's Y-axis focuses on a sliver of benthic  
 26 fish consumption—0 to 20 grams—rather than depicting the full range of benthic fish  
 27 consumption. Gotto Decl., Ex. F, at 8 (Sunding's updated Table C-1). By manipulating  
 28 the Y-axis, Cowan's graph depicts a restricted, narrow piece of the benthic fish

1 consumption rate reported by Sunding that has the effect of making a non-toxicologically  
 2 significant difference visually look more significant. Specifically, Cowan's graph fails to  
 3 account for the fact that fish consumption rate is just one input into Pleus' HHRA. Cowan  
 4 fails to account for other inputs required for a human health risk assessment (e.g., PCB  
 5 concentrations in benthic fish, EPA's Aroclor 1254 Reference Dose, duration of exposure,  
 6 etc.). Despite failing to take into account these other key toxicological considerations,  
 7 Cowan assumes that consumers of benthic fish from the LDW are at "high risk" and offers  
 8 what amounts to a lay opinion that Pleus suppresses this "high risk."

9       The City – again relying entirely on Cowan - erroneously states that "Pleus adopted  
 10 a technique focused on the median consumers" "[r]ather than evaluating the risk exposure  
 11 of the high consumers in the tail of the distribution." Motion, at 9. This is incorrect. Pleus  
 12 input the entire fish consumption range distribution into his HHRA using the Monte Carlo  
 13 simulation. Gotto Decl., Ex. A, at 6 ("This HHRA incorporates probabilistic risk  
 14 assessment (PRA) approaches, which provide distributions of possible outcomes rather  
 15 than single representative doses."); *id.* at 7-8 ("The resulting distributions of dose and  
 16 hazard or risk are intended to reflect the range of exposure and risk across an exposed  
 17 population. That is, they reflect exposures to average or typical individuals within the  
 18 population, as well as more highly and less exposed individuals.").

19       Giving Cowan the benefit of the doubt and assuming that he is not intentionally  
 20 misrepresenting the data, this is simply another example of Cowan offering opinions  
 21 admittedly outside of his area of expertise and underscores why the City's *Daubert* motion  
 22 against Pleus is misplaced and its dispute should be reserved for cross-examination.  
 23 Cowan does not understand EPA probability risk assessment methodology and is not  
 24 qualified to distinguish between values as toxicologically relevant or significant. *Id.*; *see also supra*, at 2. During his deposition, he conceded that he is unable to calculate  
 25 independently measures of potential risk in the absence of Dr. Pleus' report and back-up  
 26 materials. DeBord Decl., Ex. C, at 251:24-252:16. Yet, these misguided attempts of  
 27 Cowan to offer opinions about human health risk are the City's sole support for claiming  
 28

1 that Pleus' methodology is unreliable. Cowan's unqualified opinions should not serve as  
 2 basis on which to exclude Pleus' qualified opinions.

3 **C. Suquamish Consumption Data are More Reliable Than Tulalip Data  
 4 for Purposes of Pleus' Lower Duwamish Tribal Scenario**

5 Lastly, the City claims that Pleus' tribal human health risk assessment is unreliable  
 6 because it is based on selected data from a 2000 survey of the Suquamish Tribe rather than  
 7 a 1996 survey of the Tulalip Tribe. Motion, at 9–10. In doing so, the City tips its hand,  
 8 demonstrating that this argument is not appropriate for a *Daubert* motion. Specifically, the  
 9 City states that “Pleus offers *no credible explanation* for his selection of data on which to  
 10 base his tribal scenario.” *Id.* at 10 (emphasis added). “Credibility” determinations,  
 11 however, are reserved for the trier of fact, not a court ruling on a *Daubert* motion. *City of*  
 12 *Pomona*, 750 F.3d at 1053 (“Facts casting doubt on the credibility of an expert witness and  
 13 contested facts regarding the strength of a particular scientific method are questions  
 14 reserved for the fact finder.”).

15 In fact, Pleus offers a very direct rationale for his decision to use the Suquamish  
 16 data rather than the Tulalip data: “Consumption data of resident species of fish and  
 17 shellfish from the Puget Sound region for the Tulalip Tribe are also available, but the data  
 18 are not specific to the LDW and so were not used in the HHRA (Toy et al., 1996).” Gotto  
 19 Decl., Ex. A, at 21. That the City and its experts do not like Pleus’ explanation does not in  
 20 and of itself make that explanation not credible. The City cross-examined Pleus in  
 21 deposition and will have additional opportunities to do so at trial. Credibility  
 22 determinations should not be made at this stage of the litigation.

23 To the contrary, Pleus had very a credible reason for choosing the Suquamish data;  
 24 namely, the ability to base his assessment on site-specific information. The EPA  
 25 recommends the use of site-specific consumption rates. DeBord Decl., Ex. A, at 604. The  
 26 EPA further recommends use of Tribal-specific surveys where a cleanup site is within that  
 27 Tribe’s usual and accustomed fishing areas: “Where a Tribal-specific survey exists, and  
 28 where a cleanup site is within that Tribe’s exclusive U&A [usual and accustomed], the fish

1 and shellfish consumption exposure scenarios also should include the consumption rate  
 2 based on that Tribe's data." DeBord Decl., Ex. N (EPA (2007)), at 13. This attention to  
 3 site-specific data is precisely what Pleus' human health risk assessment includes.

4       The Tulalip Tribe's adjudicated usual and accustomed fishing rights do not include  
 5 the LDW. *See United States v. Washington*, 626 F. Supp. 1405, 1530–1532 (W.D. Wash.  
 6 1982). Conversely, EPA treats the Suquamish as having treaty fishing rights in the LDW.  
 7 *See* DeBord Decl., Ex. M (EPA Fact Sheet–Who is Who in the Lower Duwamish  
 8 Waterway) (identifying the Duwamish, Muckleshoot, Suquamish, and Yakama Tribes as  
 9 having treaty rights to fish in the LDW). The City's own expert rebuttal witness  
 10 acknowledged both of these facts, and he was unable to identify where within the broader  
 11 Puget Sound the Tulalip Tribe has fishing rights. DeBord Decl., Ex. J, at 116:13–19,  
 12 118:7–23, 128:24–129:23. In other words, the City's claim that Pleus "has no data on tribal  
 13 fishing specific to the LDW" such that "he has no basis to reach a conclusion" regarding  
 14 LDW fish consumption is plainly untrue and contradictory to the City's own argument.  
 15 Motion, at 10. The Suquamish Survey data does, in fact, allow Pleus to identify site-  
 16 specific data while the Tulalip Survey data do not.

17       The City places great weight on EPA Region 10's 2007 guidance document,  
 18 "Framework for Selecting and Using Tribal Fish and Shellfish Consumption Rates for  
 19 Risk-Based Decision making at CERCLA and RCRA Cleanup Sites in Puget Sound and  
 20 the Strait of Georgia" ("Framework"). Motion, at 11. That Framework expresses a "policy  
 21 decision" that "for sites in Puget Sound ... the consumption rate derived by EPA from data  
 22 from the Tulalip Tribes represents a sustainable consumption rate." *Id.* Thus, Region 10's  
 23 guidance was explicitly made for policy rather than scientific purposes. That said, the  
 24 decision makes sense for Puget Sound given that the Tulalip Tribe has treaty rights all over  
 25 the greater Puget Sound. *U.S. v. Washington*, 626 F. Supp. at 1530–1532. However, the  
 26 Tulalip Tribe has no such rights in the LDW specifically, which is the only site at issue in  
 27 this case. Moreover, the City ignores that the Framework makes no specific mention of  
 28 the LDW. DeBord Decl., Ex. J, at 128:24–129:23. In arguing that Pleus' data selection is

1 unreliable, the City resorts to cherry-picking evidence to support its myopic view of the  
2 case.

3 **V. CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Court deny the  
5 City's motion to exclude the aforementioned opinions and testimony of Richard C. Pleus.

6 DATED: August 22, 2022  
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**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the United States, that the following is true and correct:

I hereby certify that on August 22, 2022, I electronically served the foregoing **Defendants' Opposition to Plaintiff's Motion to Exclude Proposed Expert Testimony by Richard C. Pleus** to all counsel of record:

**Testimony by Richard C. Pleus to all counsel of record:**

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